87-1826

Supreme Court U.S.
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MAY 3, 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

DOUGLAS WAYNE SMITH,

Petitioner

vs.

CARL H. ROLEWICK,
Administrator of the Illinois
Attorney Registration &
Disciplinary Commission,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SUPREME COURT OF ILLINOIS
ILLINOIS SUPREME COURT NO. M.R. 4580
ADMINISTRATOR'S NO. 87 CH 303

PETITION FOR WRIT OF CERTIORARI

DOUGLAS WAYNE SMITH
Attorney At Law
3407 N. Pulaski Road
Chicago, Illinois 60641-4025
(312) 463-8722

QUESTIONS PRESENTED FOR REVIEW

1. Whether a subpoena duces tecum which requires the Petitioner, an attorney, to produce all of his ledgers, diaries, appointment books, advertisements, advertisement bills, notes, memorandums, documents, files, records, tax returns, cancelled checks and correspondence for the years 1981 to present, which are essential to the conduct of Petitioner's day to day operations and which constitutes 16 four and five drawer file cabinets, together with cases of receipt books, cancelled checks, receipts and other miscellaneous documents is so broad, sweeping, unreasonable, vague and indefinite that compliance violates the Petitioner's Fourth Amendment rights contained in the United

States Constitution.

2. Whether the Petitioner who produces documents in obedience of a subpoena duces tecum can be required to relinquish control of said documents to the party issuing said subpoena for the purpose of copying them.

PARTIES TO THE PROCEEDING

Carl H. Rolewick

Administrator of the Illinois

Attorney Registration and

Disciplinary Commission

ABBREVIATIONS USED IN THE TEXT

The abbreviation "Administrator" stands for Carl H. Rolewick, Administrator of the Illinois Attorney Registration and Disciplinary Commission.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SUPREME COURT OF ILLINOIS

The Petitioner, Douglas Wayne Smith, respectfully petitions this Court to issue its Writ of Certiorari to review the order of the Supreme Court of Illinois, which order was issued on February 3, 1988.

OPINION BELOW

The order of the Supreme Court of Illinois, dated February 3, 1988 is set forth in full in Appendix A hereto. Accordingly, by Rule 20.4 of the Supreme Court Rules the instant Petition for a Writ of Certiorari is timely.

JURISDICTION

The jurisdiction of this Court upon this Petition for Writ of Certiorari is invoked pursuant to 28 U.S.C., Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution,

Amendment IV: The complete text of the Fourth Amendment to the United States Constitution is set forth in Appendix B hereto.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari from the Supreme Court of Illinois is from the order of said court entered on February 3, 1988 which directed the Petitioner to comply with the subpoena duces tecum, issued by the Administrator of the Illinois Attorney Registration and Disciplinary Commission, set forth in Appendix C, and further directed the Petitioner to allow the Administrator to make copies of the documents required by the subpoena duces tecum.

The subpoena duces tecum was issued by the Administrator, was served upon the

Petitioner on December 19, 1986 and required Petitioner's appearance and production of documents on January 5, 1987. The Petitioner advised the Administrator that said subpoena duces tecum was too broad, sweeping, unreasonable, vague and indefinite. The Administrator indicated that all objections should be directed to the Supreme Court of Illinois.

The Petitioner advised the Administrator that to produce the documents requested in the subpoena duces tecum, he would have to close down his offices and deliver 16 four and five drawer file cabinets together with cases of receipt books, cancelled checks, receipts and other miscellaneous documents to the Administrator.

The Administrator suggested limiting

the scope of the production of documents required to be produced to 1985 and 1986 but never issued a subpoena duces tecum to provide for that.

On May 27, 1987, the Petitioner appeared before the Administrator pursuant to the subpoena duces tecum and brought with him his 1985 and 1986 standard daily journals, 1985 and 1986 receipt books and 1985 and 1986 appointment books which he permitted the Administrator to review and answered any questions relevant to said documents at the deposition. The Petitioner refused to relinquish control of said documents to the Administrator for copying and took the documents with him after the deposition was concluded.

On October 15, 1987, the Administrator filed his Report Pursuant

to Illinois Supreme Court Rule 754 which reports the failure of the Petitioner to comply with the subpoena duces tecum by not providing all of the documents subpoenaed and refusing to relinquish control of said documents so the Administrator could copy them. The Administrator's Report requested that the Supreme Court of Illinois issue a Rule to Show Cause why Petitioner should not be suspended from the practice of law for failure to comply with a subpoena duces tecum.

An order was entered by the Supreme Court of Illinois requiring the Petitioner to show cause, in writing, why he should not be suspended from the practice of law for failure to respond to a subpoena duces tecum as required by Supreme Court Rule 754. The Petitioner

was ordered to file his answer by December 8, 1987.

The Petitioner then filed with the Supreme Court of Illinois, which is the Court of First Instance, on December 8, 1987 his Response to Rule to Show Cause/Response to Report Pursuant to Illinois Supreme Court Rule 754, which is set forth in Appendix D. Said Response raised the issues that to require the Petitioner to produce the documents requested in the subpoena duces tecum would violate the Petitioner's Fourth Amendment rights contained in the United States Constitution. Said Response also raised the issue that when the Petitioner produces documents in obedience of a subpoena duces tecum, he cannot be required to relinquish control of said documents to the Administrator for the

purpose of copying them.

The Supreme Court of Illinois then entered an order on February 3, 1988 which directed the Petitioner to comply with the subpoena duces tecum issued by the Administrator set forth in Appendix C, and further directed the Petitioner to allow the Administrator to make copies of the documents required by the subpoena duces tecum.

ARGUMENT

The attachment to the subpoena duces tecum issued by the Administrator which indicates the documents to be produced provides that the Petitioner is to produce any and all ledgers, diaries, appointment books and records relating to his present docketing system for the period 1981 to present, any and all documents related to advertisements or solicitations placed or disseminated for

the period 1981 to present, any and all notes, memoranda, documents, records, correspondence and files related to divorces that the Petitioner accepted responsibility and completed in two days for the period 1981 to present, and any and all ledgers, documents, records and tax returns related to Petitioner's acceptance and holding of funds which represent legal fees and costs advanced for the period 1981 to present.

If the Petitioner is required to produce all of the documents requested in the subpoena duces tecum he would have to close his offices, not talk to any clients because he doesn't have the files to review their cases, and deliver to the Administrator 16 four and five drawer file cabinets together with cases of receipt books, canceled checks, receipts and other miscellaneous documents.

That the subpoena duces tecum issued by the Administrator is not limited in its demand to a reasonable period of time and is so broad, sweeping, vague and indefinite that compliance would be unreasonable, oppressive and violates Petitioner's Fourth Amendment Rights contained in the U. S. Constitution. The Fourth Amendment guarantees the right of the people to be secure in their papers and effects against unreasonable searches and seizures.

People v. Keefe, 223 NE2d 144,146, 36 Ill2d 460 (1967) provides that: "It is established law that a subpoena which is unreasonably broad in its demand and general in its terms constitutes an unreasonable search and seizure in violation of the State and Federal constitutions One from whom the production of documents is demanded is

required to choose between producing them or refusing to do so at the risk of being adjudged in contempt. In making his choice he ought not to be required to speculate as to which or what documents are required but is entitled to a reasonably informative description of that which is sought." In the instant case the Administrator has requested copies of everything since 1981 without stating the names of the specific client's files or documents he wishes to review.

People v. Lurie, 235 NE2d 637, 640 39 I112d 331 (1968) provides that "The subpoena in question demanded the production of certain books and records of the Gaylur Corporation pertaining to merchandise or materials taken from the premises of designated companies. However, in addition to these items the

subpoena demanded the production of "the following books and records of Gaylur Mercantile Corporation for a period from January 1, 1964 to March 31, 1966; general ledger, accounts receivable and accounts payable records, cash receipts and cash disbursements journals, payroll ledger, bank statements and canceled checks. Necessarily included in these records, as conceded by the auditor for the State's Attorney, were items essential to the conduct of Gaylur's day to day affairs that pertained almost exclusively to Gaylur's business relationships with companies and individuals other than those who could conceivably affect North America's interests.....Therefore, in view of the vital nature of these records to Gaylur's operations and the tenuous relationship between them and the instant

investigation it is our opinion that the portion of the subpoena naming these records is so unreasonably broad in its demand as to violate constitutional standards." This case is on point in that the files and documents are used in the day to day affairs of the business when clients call with questions relevant to their file and are vital to Petitioner's business, and there is a tenuous relationship between all of the files subpoenaed and the Administrator's investigation.

Brown v. United States, 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500 establishes the rule that a subpoena duces tecum must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate.

A 1952 note in 23 A.L.R.2d 862, 867, 869 indicates that "The Courts are apparently uniformly agreed that an application for the production of books, records and documents, made in the form of a subpoena duces tecum, must designate and specify with some reasonable degree of certainty and particularity the documents, papers, etc. sought to be produced. It has been generally held that a broad and sweeping order for the production of "any and all" books is not a sufficient designation."

In People v. Reynolds, 350 Ill 11, 182 NE 754, 755 a subpoena duces tecum was directed to certain officers of a labor union requiring the production before the Grand Jury of "all day books, cash books, ledgers, bank books, check books, and any and all other books of account showing the payment of money to

the union, its officers, or agents by members, etc. and showing its membership, income, disbursements such might afford any information respecting a certain complaint against the union officers then pending before the Grand Jury. The Illinois Supreme Court ruled the subpoena invalid and held that the papers sought to be produced should have been reasonably specified, and that to demand in general terms the production of all, or even a substantial part, of the records or documents was not sufficient and that the subpoena was lacking in a sufficiently particular description of the records sought.

In Hale v. Henkel 201 U.S. 43, 76, 77, 26 S.Ct. 370, 379. 380, 50 L.Ed. 652 it is held that a subpoena duces tecum too sweeping in its terms and therefore unreasonable, constituted a violation of

the Fourth Amendment to the U. S. Constitution, U.S.C.A., protecting a "person" from unreasonable searches and seizures. And if the number of books specified is so great as to be unreasonably burdensome to produce them all in court or before the officer, the witness may justify his failure to produce them, until such time as he or others may be examined to determine which contain relevant matter.

In Application of Linen Supply Cos., 15 FRD 115, 118 (1953) it is stated that: "A subpoena duces tecum must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate. It can be readily agreed that as the time period lengthens so must the particularity increase."

In 97 C.J.S. Witnesses, Section 25,

page 395 it is stated that: "Possession and control of documents produced - Books or papers produced in obedience to a subpoena deuces tecum remain under the control of the person producing them, and he cannot be required to deposit and leave the same with a commissioner or officer, or the clerk of the Court, but they must be returned to him after such use or examination of them as may be necessary and proper has been made."

In J. D. Pflaumer, Inc. v. U. S. Department of Justice, 450 FSupp 1125, 1135 (1978) it is stated that: "It is undisputed that the seizure of these documents was effectuated without a warrant and it is clear that a subpoena duces tecum does not confer a right to seize the subpoenaed documents."

United States v. Birrell, 242 FSupp 191, 204 (1965) provides that: "The

subpoena must be looked at to see what it commands. The command is that Dunn appear before this Court on August 27, 1959 and bring with him the records "then and there to testify". Most distinctly the subpoena does not command that Dunn deliver custody of all of the property, here in question, to the jurisdiction of the Bankruptcy Court as the government contends. Dunn could comply with the subpoena by attending with the records during the hours of court and keeping the records with him at all other times. As Judge Weinfeld has said (Application of Kelly, 19 FRD 269, S.D.N.Y. 1956): A subpoena duces tecum, unlike a search warrant, does not serve to disturb possession of the property."

CONCLUSION

To allow this Court's review and supervision of this case, the present

Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Dated: May 3, 1988

DOUGLAS WAYNE SMITH

DOUGLAS WAYNE SMITH
Attorney At Law
3407 N. Pulaski Road
Chicago, IL. 60641-4025
(312) 463-8722

APPENDIX A

IN THE

SUPREME COURT OF ILLINOIS

IN RE: Douglas Wayne Smith, Respondent	)	M.R. 4580

ORDER

The request by respondent, Douglas Wayne Smith to quash the subpoena duces tecum is denied. The rule to show cause that issued to respondent pursuant to Supreme Court Rule 754 on November 3, 1987, is continued, and respondent is directed to comply with the subpoena on or before April 6, 1988. Respondent is further directed to allow the Administrator to make copies of the documents required by the subpoena duces tecum.

F I L E D

FEB 3 1988

SUPREME COURT CLERK

APPENDIX B

UNITED STATES CONSTITUTION

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

APPENDIX C

SUBPOENA DUCES TECUM-Supreme Court of Illinois-Before Administrator

STATE OF ILLINOIS}
) SS.
SUPREME COURT }

THE PEOPLE OF THE STATE OF ILLINOIS
Administrator's No. 86-CI-6276

TO Douglas Smith

3407 North Pulaski

Chicago, IL GREETING:

WE COMMAND YOU, that all business and excuses being laid aside, you and each of you attend before the Administrator of the Attorney Disciplinary System on January 5, 1987 at 4:00 P.M. at 203 N. Wabash - Suite 1900 in the City of Chicago, County of Cook, to testify and give evidence and the truth to speak in a certain investigation now being conducted by said Administrator relating to Attorney Douglas Smith.

An that you also diligently and carefully search for, examine and inquire

after and bring with you and produce at the time and place aforesaid S E E ATTACHED together with all copies, drafts and vouchers relating to the said documents, and all other documents, letters and paper writings whatsoever, that can or may afford any information or evidence in said investigation. And this you shall in no wise omit under penalty of the law.

Witness, JULEANN HORNYAK, Clerk of our said Court, and Seal thereof at Springfield, Illinois, this 5th day of December, 1986

JULEANN HORNYAK Clerk.

No. 86-CI-6276

ATTORNEY DISCIPLINARY SYSTEM

OF THE

SUPREME COURT OF ILLINOIS

In the Matter of Douglas W. Smith

Subpeona

JULEANN HORNTYAK

Clerk of the Supreme Court of Illinois

PROOF OF SERVICE

Paul Morelli, states under oath that he served this supoena and letter personally by delivering a copy of this subpoena and letter to Douglas W. Smith on December 19, 1986 at 3407 North Pulaski Road, Chicago, Illinois at or before 6:30 p.m.

PAUL MORELLI
Paul Morelli

Subscribed and sworn to
before me this 22nd day
of December, 1986.

VICKI J. ROCHE
NOTARY PUBLIC

SUBPOENA ATTACHMENT

1. Any and all ledgers, diaries, appointment books and records related to your office docketing system for the period 1981 to present, including but not limited to, any and all records which identify matters in which you accepted responsibility for the period 1981 to present;

2. Any and all documents related to advertisements or solicitations placed or disseminated by you for the period 1981 to present, including but not limited to, copies of these advertisements and documents reflecting your being billed for these advertisements and your related payments;

3. Any and all notes, memoranda, documents, records, correspondence and files related to divorces in which you accepted responsibility and completed

within two days, for the period 1981 to present, including but not limited to, divorces in which you accepted responsibility and completed for $80.00 for the period 1981 to present; and

4. Any and all ledgers, documents, records and tax returns related to your acceptance and holding of funds which represent legal fees and costs advanced for the period 1981 to present, including but not limited to the account number, account title and name of bank in which you maintained any and all client trust accounts for the period 1981 to present.

APPENDIX D

IN THE SUPREME COURT OF ILLINOIS

In the Matter of:	)	
	)	
DOUGLAS WAYNE SMITH	)	Supreme Court
	)	No. M. R. 4580
	)	
Attorney-Respondent	)	Administrator's
	)	No. 87 CH 303
	)	
No. 3128227	)	

RESPONSE TO RULE TO SHOW CAUSE/
RESPONSE TO REPORT PURSUANT TO
ILLINOIS SUPREME COURT RULE 754

NOW COMES the Attorney-Respondent, DOUGLAS WAYNE SMITH, and in Response to the Report Pursuant to Illinois Supreme Court Rule 754 filed by CARL H. ROLEWICK, Administrator of the Attorney Registration and Disciplinary Commission, and the Order of this Court requiring DOUGLAS WAYNE SMITH to show cause why he should not be suspended from the practice of law for failure to respond to a subpoena duces tecum as required by Supreme Court Rule 754 states as follows:

1. Admits the allegations of

paragraph 1 thereof.

2. Admits the allegations of paragraph 2 thereof.

3. Admits that between 1980 and 1985 Respondent opened four law offices in the Chicago area and suburbs. Denies that there is only one office that clients are able to contact Respondent and more specifically states that he was available at all of said offices to see clients. Admits that there is only one office where the Respondent employs a full-time receptionist and secretary. Admits that the Respondent has closed one office.

4. Admits that since 1981 the Respondent has advertised for legal services in the Chicago Tribune, Chicago Sun-Times and local newspapers. Denies that Respondent's advertisements include two day divorces at $80.00. Admits that

these advertisements do not identify costs. More specifically Respondent states that these advertisements indicate that all fees are "+ Estimated Costs". Admits that as a result of these advertisements Respondent has a high volume practice.

5. Admits the allegations of paragraph 5 thereof.

6. Neither admits nor denies the allegations of paragraph 6 thereof.

7. Admits the allegations of paragraph 7 thereof.

8. Admits that the Administrator served the Respondent with a subpoena duces tecum. Denies that the subpoena duces tecum requested documents necessary to determine whether Respondent's practice was consistent with the representations made in his advertisements, Respondent's maintenance

of costs advanced and whether Respondent was adequately serving the needs of his clients.

9. Admits the allegations of paragraph 9 thereof.

10. Admits the allegations of paragraph 10 thereof.

11. Admits the allegations of paragraph 11 thereof.

12. Admits the allegations of paragraph 12 thereof.

13. Admits that on April 28, 1987 Respondent appeared before the Administrator pursuant to subpoena duces tecum which were issued related to other investigations. Admits that at that time the Respondent presented to the Administrator a document relating to the subpoena duces tecum in issue and argued that the subpoena was too broad. Admits that the Administrator suggested that any

and all objections be directed to the Supreme Court of Illinois.

Denies that the Administrator and Respondent agreed however, that the Administrator would limit the scope of production with respect to the items requested by the subpoena duces tecum to the years 1985 and 1986 and that the return date for the subpoena duces tecum would be continued to May 20, 1987. Respondent never agreed to produce all of the documents requested in the subpoena duces tecum for the years 1985 and 1986. Admits that a copy of the Report of Proceedings is attached as Exhibit 17. Admits that a copy of Respondent's Petition Pursuant to Rule 751 (e) (2) is attached as Exhibit 18.

14. Admits the allegations of paragraph 14 thereof.

15. Admits all of the allegations

of paragraph 15 except that the print-out provided to the Administrator which was obtained from the Clerk of the Circuit Court of Cook County by Respondent's attorney provided a listing of all cases Respondent filed or had pending for 1986 and 1987 and most of the cases for 1985. This print-out was prepared as of May 21, 1987.

16. Admits the allegations of paragraph 16 thereof.

FURTHERMORE, the Attorney-Respondent, DOUGLAS WAYNE SMITH, states as follows:

A. That the Respondent has done everything possible to attempt to limit and make certain the scope of the subpoena duces tecum issued by the Administrator to no avail.

B. That the Respondent prepared a four page list, consisting of 176

entries, of Judgments entered in 1986 for Divorces in which an $80 or $100 fee was charged in an attempt to determine which specific files the Administrator would like to examine pursuant to the subpoena duces tecum. The preparation of this list was very time consuming because this information is not available by computer and required that the Respondent review the files in his office to determine when the Judgment for Dissolution of Marriage was entered and the fee charged on each individual case. It was anticipated that the Administrator would utilize this list in order to determine which files the Administrator sought to review pursuant to the subpoena duces tecum.

C. That the Respondent believed that the print-out that he had supplied to the Administrator on May 27, 1987 which was prepared by the Clerk of the

Circuit Court of Cook County, Illinois on May 21, 1987 and provided a listing of all of the cases he filed to date in 1986 and 1987 and most of the cases filed in 1985 would be used as a basis to make certain and determine which files the Administrator sought to review pursuant to the subpoena duces tecum.

D. That the Respondent was waiting for some kind of written response from the Administrator indicating which files he wished to review pursuant to the subpoena duces tecum now that Respondent had provided him with two lists for the purpose of making his selection. That the Respondent had talked to an attorney for the Administrator, SUSAN D. SHIVERS, a couple of days prior to the Administrator issuing its Report Pursuant to Illinois Supreme Court Rule 754 and nothing was even mentioned about his

alleged non-compliance with the subpoena duces tecum.

E. That the Respondent believes that he has over approximately 1,800 divorce files which were either opened 1985 and 1986 or for which a Judgment for Dissolution of Marriage was entered in 1985 or 1986. Some of the cases opened in 1985 and 1986 are still pending and not disposed of. The Respondent has no list of files which he accepted responsibility and completed within two days or charged a fee of $80.00 other than those lists previously supplied to the Administrator and would have to review every file to determine whether it feel within these constraints. That the Respondent is a sole practitioner and he has advised SUSAN D. SHIVERS, attorney for the Administrator that if he would be required to produce all of said files for

1985 and 1986 this would be a great hardship and burden on him and would virtually close his office down. Also, it would be impossible for the Administrator to examine him on all of these files in a deposition pursuant to a subpoena duces tecum.

F. That the Respondent utilizes a standard Retainer Agreement which is always signed by the Respondent and his client at the time of the first office consultation and explains the Respondent's fees in great detail including the provision that the Client will be in Court two days after the papers are signed by both parties at an additional fee of $100.00; or prior to the change in the Court system, when Judgments were entered instanter, that the Client's divorce will be final in two days for an additional fee of $100.00.

That the Administrator has numerous copies of said Retainer Agreements and in all complaints filed against the Respondent he has been able to show that he has complied with said Retainer Agreement. That in all advertisements that the Respondent has disseminated there is always an indication "At Additional Cost" after the Statement "Court in 2 Days" or previously under the old court system "Final in 2 Days". That a copy of the advertisements and the Retainer Agreement that the Respondent utilized to coincide with the advertisement "Court in 2 Days" are attached to the Administrator's Report Pursuant to Illinois Supreme Court Rule 754.

G. That the subpoena duces tecum is not limited in its demand to a reasonable period of time and is so

broad, sweeping, vague and indefinite that compliance would be unreasonable, oppressive and violates Respondent's Fourth Amendment Rights contained in the U. S. Constitution. The Fourth Amendment guarantees the right of the people to be secure in their papers and effects against unreasonable searches and seizures.

People v. Keefe, 223 NE2d 144,146, 36 Ill2d 460 (1967) provides that: "It is established law that a subpoena which is unreasonably broad in its demand and general in its terms constitutes an unreasonable search and seizure in violation of the State and Federal constitutions One from whom the production of documents is demanded is required to choose between producing them or refusing to do so at the risk of being adjudged in contempt. In making his

choice he ought not to be required to speculate as to which or what documents are required but is entitled to a reasonably informative description of that which is sought." In the instant case the Respondent has provided two lists to the Administrator and requested a list of those cases which the Administrator wishes to examine the Respondent about.

People v. Lurie, 235 NE2d 637, 640 39 I112d 331 (1968) provides that "The subpoena in question demanded the production of certain books and records of the Gaylur Corporation pertaining to merchandise or materials taken from the premises of designated companies. However, in addition to these items the subpoena demanded the production of "the following books and records of Gaylur Mercantile Corporation for a period from

January 1, 1964 to March 31, 1966; general ledger, accounts receivable and accounts payable records, cash receipts and cash disbursements journals, payroll ledger, bank statements and canceled checks. Necessarily included in these records, as conceded by the auditor for the State's Attorney, were items essential to the conduct of Gaylur's day to day affairs that pertained almost exclusively to Gaylur's business relationships with companies and individuals other than those who could conceivably affect North America's interests.....Therefore, in view of the vital nature of these records to Gaylur's operations and the tenuous relationship between them and the instant investigation it is our opinion that the portion of the subpoena naming these records is so unreasonably broad in its

demand as to violate constitutional standards." This case is on point in that there are no specific complaints outstanding against the Respondent relating to those files subpoenaed, the files and documents are used in the day to day affairs of the business when clients call with questions relevant to their file and are vital to Respondent's business, and there is a tenuous relationship between all of the files subpoenaed the Administrator's investigation.

Brown v. United States, 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500 establishes the rule that a subpoena duces tecum must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate.

A 1952 note in 23 A.L.R.2d 862, 867, 869 indicates that "The Courts are apparently uniformiy agreed that an application for the production of books, records and documents, made in the form of a subpoena duces tecum, must designate and specify with some reasonable degree of certainty and particularity the documents, papers, etc. sought to be produced. It has been generally held that a broad and sweeping order for the production of "any and all" books is not a sufficient designation."

In People v. Reynolds, 350 Ill 11, 182 NE 754, 755 a subpoena duces tecum was directed to certain officers of a labor union requiring the production before the Grand Jury of "all day books, cash books, ledgers, bank books, check books, and any and all other books of account showing the payment of money to

the union, its officers, or agents by members, etc. and showing its membership, income, disbursements such might afford any information respecting a certain complaint against the union officers then pending before the Grand Jury. The Illinois Supreme Court Ruled the subpoena invalid and held that the papers sought to be produced should have been reasonably specified, and that to demand in general terms the production of all, or even a substantial part, of the records or documents was not sufficient and that the subpoena was lacking in a sufficiently particular description of the records sought.

In Hale v. Henkel 201 U.S. 43, 76, 77, 26 S.Ct. 370, 379. 380, 50 L.Ed. 652 it is held that a subpoena duces tecum too sweeping in its terms and therefore unreasonable, constituted a violation of

the Fourth Amendment to the U. S. Constitution, U.S.C.A., protecting a "person" from unreasonable searches and seizures. And if the number of books specified is so great as to be unreasonably burdensome to produce them all in court or before the officer, the witness may justify his failure to produce them, until such time as he or others may be examined to determine which contain relevant matter.

In Application of Linen Supply Cos., 15 FRD 115, 118 (1953) it is stated that: "A subpoena duces tecum must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate. It can be readily agreed that as the time period lengthens so must the particularity increase."

The previous article and cases

previously cited are right on point because paragraphs 1, 2, 3, and 4 of the subpoena duces tecum attachment, which has been narrowed to 1985 and 1986 per the Administrator, requires that the Respondent bring the following documents with him for examination:

1. Any and all ledgers, diaries, appointment books, and records related to your office docketing system for the period 1981 to present, including but not limited to, any and all records which identify matters in which you accepted responsibility for the period 1981 to present.

2. Any and all documents related to advertisements or solicitations placed or disseminated by you for the period 1981 to present, including but not limited to, copies of these advertisements and documents

reflecting your being billed for these advertisements and your related payments.

3. Any and all notes, memorandum, documents, records, correspondence and files related to divorces in which you accepted responsibility and completed within two days, for the period 1981 to present, including but not limited to, divorces in which you accepted responsibility and completed for $80.00 for the period 1981 to present.

4. Any and all ledgers, documents, records and tax returns related to your acceptance and holding of funds which represent legal fees and costs advanced for the period 1981 to present, including but not limited to the account number, account title and name of bank in which you maintained any and all client trust accounts for the period 1981

to present.

These documents requested, as limited to 1985 and 1986 by the Administrator, cover every single document prepared or received in my office in 1985 and 1986, including approximately 1,800 divorce files, approximately 500 bankruptcy files, approximately 100 traffic court and other miscellaneous files, every note, every check written, every receipt, docket book, and anything else that might have been written down in 1985 and 1986.

If the documents requested in the subpoena duces tecum were not limited to 1985 and 1986 and covered 1981 to present as stated in the subpoena duces tecum the Respondent would be required to deliver to the Administrator 16 four drawer and five drawer file cabinets together with cases of receipt books, canceled checks,

receipts and other miscellaneous documents. This was brought to the Administrator's attention to no avail.

H. Paragraph 15 of the Administrator's Report Pursuant to Illinois Supreme Court Rule 754 appears to indicate that the Respondent did not comply with the subpoena deuces tecum when he appeared for a deposition pursuant to a subpoena deuces tecum on May 27, 1987 and after the deposition was completed and he answered all of the questions posed to him relating to the documents that he had produced, and had the documents available for the Administrator's inspection, he refused to permit the Administrator to retain the documents in order to make copies.

In 97 C.J.S. Witnesses, Section 25, page 395 it is stated that: "Possession and control of documents produced - Books

or papers produced in obedience to a subpoena deuces tecum remain under the control of the person producing them, and he cannot be required to deposit and leave the same with a commissioner or officer, or the clerk of the Court, but they must be returned to him after such use or examination of them as may be necessary and proper has been made."

In J. D. Pflaumer, Inc. v. U. S. Department of Justice, 450 FSupp 1125, 1135 (1978) it is stated that: "It is undisputed that the seizure of these documents was effectuated without a warrant and it is clear that a subpoena duces tecum does not confer a right to seize the subpoenaed documents."

United States v. Birrell, 242 FSupp 191, 204 (1965) provides that: "The subpoena must be looked at to see what it commands. The command is that Dunn

appear before this Court on August 27, 1959 and bring with him the records "then and there to testify". Most distinctly the subpoena does not command that Dunn deliver custody of all of the property, here in question, to the jurisdiction of the Bankruptcy Court as the government contends. Dunn could comply with the subpoena by attending with the records during the hours of court and keeping the records with him at all other times. As Judge Weinfeld has said (Application of Kelly, 19 FRD 269, S.D.N.Y. 1956): A subpoena duces tecum, unlike a search warrant, does not serve to disturb possession of the property."

I. That the Administrator ordered a credit bureau report on the Respondent, which is completely irrelevant to his practice of law and violates the Respondent's right to privacy and was

done without even notifying the Respondent so that he may make the proper objection, goes to show the amount of bad faith on the part of the Administrator in conducting his investigation.

J. That the Administrator has subpoenaed the Respondent's 1981 through 1987 income tax returns. The Administrator subsequently stated that the 1985 and 1986 income tax returns would suffice. Respondent has produced his Schedule C for 1985 and will produce his Schedule for 1986 which covers all of the transactions relating to the conducting of his law practice. The 1986 Schedule C was not produced previously because when the deposition pursuant to the subpoena duces tecum was held the Respondent had not completed his 1986 income tax returns. The Administrator insists upon copies of the complete

income tax returns but has not been able to show how said complete tax returns are relevant to his investigation. The amount of Respondent's itemized deductions, rental income, etc. are irrelevant to the Respondent's practice of law.

WHEREFORE, the Attorney-Respondent, DOUGLAS WAYNE SMITH, prays for the following relief:

I. That the Rule to Show Cause entered against the Attorney-Respondent, DOUGLAS WAYNE SMITH, be dismissed.

II. That the subject deuces tecum issued by the Administrator of the Attorney Registration and Disciplinary Commission be quashed.

III. For such other and further relief as the Court deems just, appropriate and equitable.

Respectfully submitted,

DOUGLAS WAYNE SMITH
DOUGLAS WAYNE SMITH

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

DOUGLAS WAYNE SMITH, being first duly sworn upon oath deposes and states that he has read the above and foregoing Response to Rule to Show Cause / Response to Report Pursuant to Illinois Supreme Court Rule 754, by him subscribed and said statements are true and correct.

DOUGLAS WAYNE SMITH
DOUGLAS WAYNE SMITH

Subscribed and Sworn to before me
on December 8, 1987.

Notary Public

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